INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,
Petitioner

vs.

ALAN V. RASH, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

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SUPPLEMENTAL BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Paragraph 5 of Rule 41, Rules of the Supreme Court, Respondent Waggoner Carr moves for leave to file the attached supplemental brief, and makes the following statement in support of the motion.

On page 21 of his brief in chief, Respondent quoted from an article by Abner V. McCall, Dean of the School of Law, Baylor University, describing the precursor of the present Texas law, which completely disfranchised military personnel, as a "novel" provision "no doubt inspired by the mutinous conduct of the non-

resident volunteers who had been recruited in the United States after the Battle of San Jacinto" in the year 1836. Independent research into the background of this provision on January 21 and 22, 1965, revealed that the historian had been inaccurate in saying that this was a novel provision, and further revealed that the incidents mentioned as having inspired the provision were at most only a contributing factor in its having been preserved in future constitutions of the State.

This new material does not have a major bearing on the merits of the case, and we are not even sure whether it is favorable or unfavorable to Respondent's position, but we do not wish to be instrumental in causing or perpetuating an historically inaccurate statement. We would be especially chagrined if the Court happened to refer in its opinion to the historical background of the present law and repeated the inaccuracy because of our failure to point it out.

Counsel for Respondent intended to call this new matter to the Court's attention during oral argument, but more time than had been anticipated was consumed in answering questions from the Bench and we were unable to reach this subject. We ask leave to file this supplemental brief so that the record may now be set straight.

SUPPLEMENTAL BRIEF

On page 21 of his main brief, Respondent quotes from an article written in 1952 by Abner V. McCall, Dean of the Law School of Baylor University, on "History of Texas Election Laws," which states that the first election law passed by the Republic of Texas in 1837 contained a "novel" provision which disfran-

chised persons in military service, and that this provision "was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto" in 1836.

During the week preceding oral argument in this case, in preparation for argument and possible questions from the Bench on details of the occurrences in 1836, we undertook to do some original research into the background of the Texas law. The disfranchising provision first came into the law as a statute passed in 1837. It was embodied into the Constitution in 1845, and remained in each succeeding Constitution until replaced by the present provision in 1954.

The journals and debates of the 1845 constitutional convention are contained in over 1100 unindexed pages, and we had not previously attempted to locate the portions dealing with this provision. Neither had we previously read any historical accounts of the events of 1836-37.

From our research in the State Archives, we concluded that the historian was correct in conjecturing that the army's conduct had been the immediate inspiration of the 1837 statute, but we also discovered an enlightening history of the provision in the 1845 Constitutional Convention, which showed that it was not a novel provision, as the historian had thought, and that it was motivated by considerations in addition to the possibility of a concerted military take-over at the polls.

The franchise article of the proposed Constitution of 1845, as originally drafted, had made no reference

to persons in military service. The following is reported on page 159 of the Debates of the Convention:

> "Mr. Anderson moved to insert 'providing that no soldier, seaman or marine belonging to the army or navy of the United States, shall be entitled to vote in any election to be held under this Constitution.'
>
> "He thought no argument was necessary to convince the mind of the necessity of this provision. It was sustained by precedents, being contained in nearly every State Constitution in the United States. Without something of the kind, those who should be introduced here for purposes of defence, would be permitted to mingle in elections, without knowing the wants and necessities of the particular county where they might vote, and might frequently elect an individual to represent us in some office of the State, contrary to the express wish of the county.
>
> "Amendment adopted."

So, we see that the motivation for preventing the military from voting was not only because they were subject to control which might result in concerted action at the polls, but also because they were likely not to know "the wants and necessities" of the locality where they might vote. This was before the time of absentee voting, and only in rare instances would a soldier on active duty have an opportunity to vote except in the locality where he was stationed.[1] At that time the actual effect of the disfranchisement was not greatly different from the present-day provision.

The assertion that a similar provision was contained

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[1]See Note, 14 A.L.R. 1256, for a history of absentee voting laws.

in nearly every state constitution in the United States particularly caught our attention, because we had accepted the historian's statement that this was a "novel" provision. We made a check of early state constitutions[2] and found that Mr. Anderson had overstated the case but that seven of the other 27 States then in existence did have laws disfranchising persons in military service. A number of the other 20 States had dealt with the matter through laws pertaining to acquisition of residence. A summary of these laws is set out in an appendix to this brief.

During the Civil War, when many States enacted their first absentee voting laws in order to enable the volunteer soldiers to vote, these States apparently came to realize that this disfranchising provision accomplished more than they had set out to accomplish, in that it prevented the soldiers not only from voting at the place where they were stationed, but from voting back home as well.[3] By 1870, this provision had virtual-

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[2]Early state constitutions are collected in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, compiled under an order of the United States Senate by Ben. Perley Poore (Government Printing Office, 1877).

[3]Illustrative of the early absentee voting laws are those of Connecticut, added in 1864, and of Maine, added in 1865. Article of Amendment XIII to the Constitution of Connecticut, ratified in 1864, read:

> "Every elector in this State who shall be in the military service of the United States, either as a drafted person or volunteer, during the present rebellion, shall, when absent from this State, because of such service, have the same right to vote in any election of State officers, Representatives in Congress, and electors of President and Vice-President of the United States, as he would have if present at the time of his enlistment into such service. This provision shall in no case extend to persons in the regular Army of the United States, and shall cease and become inoperative and void upon the termination of the

ly disappeared, and in its place had been substituted a provision on acquisition of residence while in service.

Most States today have constitutional or statutory provisions dealing with acquisition of residence by persons in military service. We collected these laws for *Mabry v. Davis*, 232 F.Supp. 930 (W.D. Tex. 1964), and they are set out in Defendants' Exhibit D, which is a part of the appeal record in that case (*Davis v. Mabry*, No. 774, O.T. 1964). In some States, the law provides that a person in military service shall not be deemed to have gained a residence by being stationed on duty in the State, and this provision has been construed to mean that mere presence does not make the person a resident but that he may become a resident by choice. In some States, the law is worded to say that no person in military service *shall acquire* a resi-

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present war. The general assembly shall prescribe by law in what manner and in what time the votes of electors absent from this State, in the military service of the United States, shall be received, counted, returned and canvassed."

Article of Amendment XII to the Constitution of Maine, ratified in 1865, read:

"But citizens of the State absent therefrom in the military service of the United States, or of this State, and not in the Regular Army of the United States, being otherwise qualified electors, shall be allowed to vote on Tuesday next after the first Monday of November, in the year of our Lord one thousand eight hundred and sixty-four, for governor and senators, * * *. On the day of election a poll shall be opened at every place without the State where a regiment, battalion, battery, company, or detachment of not less than twenty soldiers from the State of Maine may be found or stationed, and every citizen of said State of the age of twenty-one years, in such military service, shall be entitled to vote as aforesaid; and he shall be considered as voting in the city, town, plantation, and county in this State where he resided when he entered service. * * *"

dence by being stationed in the State, or uses other language indicating on its face an intent to prevent military personnel from becoming qualified electors at the place where they are stationed.

Petitioner has stated in his brief that so far as he can ascertain, Texas is the only State which denies voting privileges to a legal resident of the State solely for the reason that he is in the military service. Also, in *Maybry v. Davis* the Court quoted a statement by the Information and Education Office of the Department of Defense that "almost all states except Texas will permit persons in the Armed Forces to acquire a new voting residence."

Even if Petitioner's statement were correct, it would not condemn as unreasonable the public policy of this State against permitting a concentration of military voting strength. But many of the state provisions which are worded in terms evidencing an intent to prevent acquisition of residence have not been construed in the courts, and our correspondence with the Attorneys General in a number of these States convinces us that the suggested uniqueness of the Texas law is not accurate. It is true, however, that some of these provisions have been construed to mean merely that stationing does not automatically confer residence and that a person may become a resident if he chooses. Usually, the question has arisen in some context other than voting, the most usual being in divorce actions where the plaintiff sought to claim domicile and maintain the action at the place where he was stationed. See Note, 21 A.L.R.2d 1163.

The background of present-day provisions in the laws of other States which formerly had provisions

disfranchising persons in military service gives pretty clear indication that in instances where the law declares that no person in military service *shall acquire* a residence, it was intended to mean what it said. It is indeed questionable whether the courts have properly construed the law in some States, when they have held that the provision does not preclude the soldier or sailor from acquiring a voting residence during service.

We submit that the public policy of Texas in preventing soldiers from acquiring a voting residence where they are stationed is not an anomaly, but existed in other States also for long periods of time, and still exists elsewhere.

"But," one might argue, "granting that the courts have misconstrued the law in some of the States which had adopted the same policy, the fact that these States have not overturned the court decisions through legislative processes shows that the original policy to exclude them from voting where they were stationed had been found to be unnecessary." This conclusion does not follow, knowing as we all do how the populace, the same as an individual, may become inured to the presence of a canker and never go to the doctor to have it treated.

But even if it could be said that these States have wittingly and voluntarily abandoned their former public policy, that does not condemn as unreasonable or unnecessary the public policy of this State. Thirty-six States have declared, as a matter of public policy, that a citizen must have resided in the State for a year before he can vote, and two States require a residence of two years. Twelve States require a residence of only

six months.* Can it be said that the requirement of the other 38 States is rendered unreasonable because these 12 States make a lesser requirement? Or that literacy requirements for voting are to be struck down as unnecessary because many States do not have them, and their government survive without them? Certainly not.

In whatever light it is viewed, the recently-discovered historical material set forth in this brief cannot detract from the reasonableness of the present Texas law, and we submit that these historical precedents further substantiate its reasonableness and validity.

Respectfully submitted,

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*See table on p. 24 of *The Book of the States, 1964-1965*, published by The Council of State Governments.

PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1965, I served copies of the foregoing Supplemental Brief on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL

APPENDIX

Provisions in State Constitutions in the Year 1845 in Regard to Voting by Persons in Military Service

Texas was admitted to the United States in 1845 as the twenty-eighth State. The constitution adopted by the State of Texas in 1845 contained the following provision (Art. III, Sec. 1):

> "Every free male person who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, or who is at the time of the adoption of this Constitution by the Congress of the United States, a citizen of the Republic of Texas, and shall have resided in this State one year next preceding an election, and the last six months within the district, county, city, or town, in which he offers to vote (Indians not taxed, Africans and descendants of Africans excepted), shall be deemed a qualified elector: and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer, provided that the qualified electors shall be permitted to vote anywhere in the State for State officers, *and provided further that no soldier, seaman, or marine in the Army or Navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

At that time the constitutions of seven other States had provisions excluding either all or some portion of the military from voting, as follows:

Alabama. Art. III, Sec. 5 of the Constitution of 1819, after stating the requisites for a "qualified elector," contained this proviso: "Provided, that no sol-

dier, seaman, or marine, in the regular Army or Navy of the United States, shall be entitled to vote at any election in this State."

Arkansas. Art. IV, Sec. 2 of the Constitution of 1836 contained the following provision: "* * * provided, that no soldier, seaman or marine, in the Army or Navy of the United States, shall be entitled to vote at any election within this State."

Indiana. Art. VI, Sec. 1 of the Constitution of 1816 read as follows: "In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who has resided in the State one year immediately preceding such election, shall be entitled to vote in the county where he resides; except such as shall be enlisted in the army of the United States or their allies."

Louisiana. Article 12 of the Constitution of 1845 read as follows: "No soldier, seaman or marine in the Army or Navy of the United States, no pauper, no person under interdiction, nor under conviction of any crime punishable with hard labor, shall be entitled to vote at any election in this State."

Missouri. Art. III, Sec. 10 of the Constitution of 1820 contained this provision: "* * * * provided, that no soldier, seaman or marine in the Regular Army or Navy of the United States shall be entitled to vote at any election in this State."

South Carolina. Art. I, Sec. 14 of the Constitution of 1790 was amended in 1810 to add the exceptions to its franchise provisions. As amended, the section read: "Every free white man of the age of twenty-one years,

paupers, and non-commissioned officers and private soldiers of the Army of the United States excepted, being a citizen of this State, * * * shall have a right to vote * * *."

Virginia. Art. III, Sec. 14 of the Constitution of 1830 contained this provision: "* * * provided, nevertheless, that the right of suffrage shall not be exercised by any person of unsound mind, or who shall be a pauper, or a non-commissioned officer, soldier, seaman, or marine in the service of the United States, or by any person convicted of any infamous offence."

The constitutions of the following States, in conjunction with provisions defining who was entitled to vote, contained provisions regarding acquisition of residence (domicile) during military service, stating that no person in military service "shall be deemed a resident of the State in consequence of being stationed therein," or "shall acquire a residence by being stationed in the State," or making some similar provision:

Delaware—Constitution of 1831, Art. IV, Sec. 1.

Florida—Constitution of 1838, Art. VI, Sec. 1.

Maine—Constitution of 1820, Art. II, Sec. 1.

Michigan—Constitution of 1835, Art. II, Sec. 6.

New Jersey—Constitution of 1844, Art. II, Sec. 1.

Rhode Island—Constitution of 1842, Art. II, Sec. 4.

The constitutions of the following States contained provisions defining who was entitled to vote, but made no specific mention of persons in military service, either in regard to voting or in regard to acquisition of residence: Connecticut, Georgia, Illinois, Kentucky, Mary-

land, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Vermont. Several of these States later added provisions pertaining to acquisition of residence while in military service. See Defendants' Exhibit D in the appeal record in *Davis v. Mabry,* Docket No. 774, O.T. 1964.